

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERIC WARD,)	
)	
Plaintiff/Appellee,)	2 CA-CV 2009-0031
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
CIVIL SERVICE COMMISSION OF)	Rule 28, Rules of Civil
THE CITY OF TUCSON,)	Appellate Procedure
)	
Defendant/Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20074268

Honorable John F. Kelly, Judge

REVERSED

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V Á S Q U E Z, Judge.

¶1 In this appeal, the Civil Service Commission of the City of Tucson (Commission) challenges the superior court's ruling in a special action filed by appellee Eric Ward, a City of Tucson police officer. The court vacated the Commission's decision affirming Ward's disciplinary suspension without pay, concluding it was arbitrary and capricious because the Commission's findings were not supported by the evidence. The court further ordered that Ward be reinstated with back pay. The Commission argues there was sufficient evidence to support its order and the court inappropriately weighed the evidence. Alternatively, it contends that if the evidence was insufficient, the court should have remanded the matter to the Commission rather than vacating its decision. Because there was sufficient evidence to support the Commission's findings and order, we reverse.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the Commission's decision. *See Golob v. Ariz. Med. Bd.*, 217 Ariz. 505, n.1, 176 P.3d 703, 705 n.1 (App. 2008). On July 14, 2005, Ward and his partner Mark Sampson were engaged in a traffic stop when they received a radio call that there had been an armed carjacking nearby. By triangulating a cellular telephone stolen during the carjacking, the officers located the suspect vehicle. Ward and Sampson were not in uniform, so they called for a marked police car to make the stop. Officer Atchley arrived in his marked patrol car just before the vehicle unexpectedly turned into a motel parking lot and stopped. Ward parked his vehicle to the left of the suspect's vehicle and Atchley pulled in behind it.

¶3 Ward and Sampson got out of their vehicle and positioned themselves behind a car parked next to the suspect's, and Atchley took cover behind his police car. All three officers aimed their guns at the suspects. Ward and Sampson identified themselves as police officers and ordered the vehicle's two occupants to show their hands. While these commands were being given, the vehicle's reverse lights came on, and the car slowly rolled back twice. The vehicle then accelerated backwards into Atchley's patrol car. "[A]lmost simultaneous[ly] with the impact," Ward fired three gunshots toward the driver's side of the vehicle, hitting the driver in the arm and hand; she was eventually taken to the hospital. The officers arrested the male passenger, who matched the description of one of the carjackers.

¶4 An investigation by the Tucson Police Department Office of Internal Affairs followed, and a Board of Inquiry (BOI) was later convened to review the circumstances surrounding Ward's discharge of his weapon. After completing its investigation, the BOI determined that Ward's actions had not been justified and therefore were not within departmental policy governing the use of deadly force. Ward's division and bureau commanders and the chief of police agreed. Ward was suspended without pay for the minimum length of time according to the disciplinary guidelines, 140 hours. Ward appealed to the Commission. After a two-day evidentiary hearing, the Commission affirmed Ward's suspension, finding his use of deadly force was not within departmental policy because he had "acted too quickly and without sufficient consideration of the use of lesser means of force than shooting the suspect vehicle's driver." Although the Commission concluded the

disciplinary action had been justified, it found the suspension of 140 hours too severe and reduced his suspension to eighty hours.

¶5 Ward filed a special action in superior court, arguing the Commission's ruling was arbitrary and capricious because it had disciplined him, despite the fact that it concluded he had "reasonably perceived an imminent threat of serious physical injury or death." After argument, the court found, "The problem with the Commission's argument [in support of its decision] is it has cited no evidence in the record to support the conclusion that [Ward] had less[e]r means of force available to him to prevent the reasonably perceived threat to his fellow officer." The court vacated the Commission's decision and ordered Ward reinstated with back pay.

¶6 The Commission filed a motion for reconsideration in which it pointed to specific evidence that it contended had supported its finding that Ward had acted too quickly and without sufficient consideration of lesser means of force. In denying the motion, the court again stated that "[t]here was no competent evidence that [Ward] failed to consider the use of lesser means of force" and affirmed its prior ruling. This timely appeal followed.

Standard of Review

¶7 Because the record before us is identical to that which was before the superior court, we review its conclusions de novo. *M & M Auto Storage Pool, Inc. v. Chemical Waste Mgmt., Inc.*, 164 Ariz. 139, 143, 791 P.2d 665, 669 (App. 1990). And we will defer to the

Commission's decision if any credible evidence supports it. *See Burroughs v. Town of Paradise Valley*, 150 Ariz. 570, 573, 724 P.2d 1239, 1242 (App. 1986).

Discussion

¶8 In its decision affirming Ward's suspension without pay, the Commission referred to Tucson Police Department General Order 2040, which relates to an officer's use of deadly force. That regulation provides: "Deadly force may only be used when an officer reasonably perceives an imminent threat of serious physical injury or death to the officer or another person. When feasible, officers will attempt to utilize lesser means of force prior to using deadly force."¹ The Commission concluded that "[a]lthough [Ward] did reasonably perceive an imminent threat of harm, he nevertheless acted too quickly and without sufficient consideration of the use of lesser means of force than shooting the suspect vehicle's driver." On appeal, the Commission argues "[t]he evidence before [it] was more than sufficient to support [its] Findings, its conclusion that just cause existed for Ward's discipline and its Decision to uphold the imposition of a reduced suspension without pay." We agree.

¶9 The Tucson City Charter provides that "[p]ersons who have served through their probationary period and who have received permanent appointment shall not be . . .

¹Ward argues that the Commission found the shooting to have been within policy but disciplined him nonetheless. However, the plain language of this regulation requires both an imminent threat of serious physical injury or death *and* that a lesser means of force was not available. Here, the Commission specifically found he had used deadly force too soon and had not adequately considered the availability of lesser means of force. Thus, contrary to his argument, the Commission did not find the discharge of his weapon to be in accordance with policy.

suspended without pay . . . except for just cause.” Tucson City Code, pt. 1, ch. 22, § 3(c). Just cause includes, inter alia, “discourteous treatment of the public . . . [and] violation of . . . the rules and regulations of the department in which an employee is employed.” *Id.* pt. 2, ch. 10, art. I, § 10-3. To support the conclusion that there is just cause for disciplining an officer, the Commission is required to set forth the basic facts supporting that conclusion. *Civil Serv. Comm’n of Tucson v. Livingston*, 22 Ariz. App. 183, 188-89, 525 P.2d 949, 954-55 (1974). However, its findings “need not take any particular form so long as they fairly disclose . . . the basic facts upon which the board relies and its ultimate conclusions therefrom.” *Id.*, quoting *Penn. R. Co. v. Dep’t of Pub. Utilities*, 102 A.2d 618, 631 (N.J. 1954). And, in reviewing the decision, the superior court “should neither consider the propriety of the Commission’s findings nor substitute its judgment for that of the Commission.” *City of Tucson v. Mills*, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976). Instead, it must defer to the Commission’s factual findings unless they are “without any evidence to support [them], or [are] absolutely contrary to uncontradicted and unconflicting evidence.” *Ariz. Dep’t of Pub. Safety v. Dowd*, 117 Ariz. 423, 426, 573 P.2d 497, 500 (App. 1977).

¶10 Here, the Commission set forth what it found to be the pertinent factual findings, including that Ward had “reasonably perceived an imminent threat of serious physical injury or death to [Officer Atchley]” and that he had “acted too quick[ly] and without sufficient consideration of the use of lesser means of force than shooting the suspect

vehicle's driver." Implicit in this finding is that by acting too quickly he failed to consider the option of no force, which is a lesser means of force. The Commission had a vast amount of evidence before it, including testimony during the BOI review, the conclusions of the BOI, and the testimony during the Commission's hearing.

¶11 In its written findings, the BOI stated that any imminent threat to Atchley, Ward, or Sampson could have been avoided if they had "moved to a better position of cover and proceeded to verbal commands for a high-risk stop." It similarly concluded that "better tactics could have been used during the high-risk stop." During his testimony before the BOI, Ward was asked why he chose to take an advanced position rather than taking cover behind his or Atchley's vehicle, and he acknowledged "it probably could have been done better with hindsight." He also stated that once the vehicle backed up and he was no longer in a position of cover, he "probably should have gotten behind th[e] car [providing cover]" but did not do so. Atchley similarly testified before the BOI that had Ward and Sampson "remained behind cover, . . . [they] could . . . have . . . [a]dapted the high risk stop to this situation" before the shooting and "continued trying to do the high risk stop from [their position of cover]."

¶12 Ward also testified extensively at the hearing before the Commission about the events leading up to the shooting. He told the Commission what he had been focusing on and thinking about during the incident. He stated that when the suspect's vehicle had slowly

rolled back twice, he did not perceive a threat to Atchley, but once the car began to accelerate backwards, he testified,

I remember seeing the car . . . go back at a high rate of speed. . . . It's turning and that's when I'm looking, okay, where . . . this car can go and that's where I see the patrol car and I see Officer Atchley . . . behind the car.

So things are processing, okay. Is she trying to escape, is she . . . going to hit this patrol car . . . where this officer is? All these things are going through my mind now. That's when she . . . helps me make my decision to shoot, . . . at that point [it] is her actions.

He later acknowledged he was “assessing, as much as [he could] in these split seconds, all the possibilities that she could be doing.” Ward never stated, however, that he had considered the feasibility of using a lesser means of force before deciding to discharge his gun. And his testimony that it was her backwards acceleration that “helped” him decide to employ deadly force, not that he believed he had no other option but to shoot in order to protect Atchley’s life, illustrates that he acted too quickly in shooting the driver.

¶13 Furthermore, Robert Shoun, the chairman of the BOI, testified during the hearing that Atchley was not trapped behind the vehicle “in such a position that he could not move” as the suspect vehicle backed into his police car. He told the Commission that “even the fact that Officer Ward shot the driver doesn’t somehow cease the vehicle’s momentum. That vehicle would have continued backwards either on its own momentum or with the driver applying brakes.” And when Ward’s counsel asked Officer McDole, a member of the BOI, if he believed Ward should have fired his gun, McDole stated, “I believe he shouldn’t

have fired. . . . We teach cops to use their police cars as cover. . . . If we're teaching you to hide behind your car when people are shooting at you, we can certainly expect you to hide behind your car if somebody's backing their car into yours. . . . Or run away." Additionally, another BOI member testified that once the vehicle had struck the police car, he "d[id]n't see the threat there with . . . just the car being stopped and the person accelerating. You know, Officer Atchley can move out of the way now"

¶14 Although much of this evidence was challenged on cross-examination, it nonetheless supports the Commission's finding that other options, such as taking cover once the car began to move, or running away from the vehicle's path, were available to dissipate the deadly threat. And there was evidence that Ward had failed to consider these options fully before shooting. Further supporting the Commission's conclusion that Ward's actions were too hasty was Officer McDole's observation that shooting at the driver did not end the threat of the car moving backwards and colliding with Atchley's police car.

¶15 To sustain the Commission's ruling, this court need only find some evidence to support it; neither the superior court nor this court may re-weigh the evidence. *See Mills*, 114 Ariz. at 111, 559 P.2d at 667. Therefore, there is some evidence in the record to support the Commission's finding that Ward did not utilize "feasible . . . lesser means of force"—including no force at all—prior to using deadly force, as required by the use-of-force

regulation. The superior court thus erred in concluding the Commission lacked cause to affirm Ward's suspension and in vacating its decision.²

Disposition

¶16 For the reasons stated above, we vacate the superior court's order and reinstate the Commission's decision affirming Ward's eighty-hour suspension without pay.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).

²Because our resolution of this ground disposes of all issues before the court, we need not consider the Commission's alternate argument that the superior court erred in vacating the disciplinary order rather than remanding the matter to the Commission for further proceedings.